

Before the  
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LIBRARY OF CONGRESS  
Washington, D.C.

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IN THE MATTER OF: )  
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DIGITAL PERFORMANCE RIGHT )  
IN SOUND RECORDINGS AND )  
EPHEMERAL RECORDINGS )  
\_\_\_\_\_ )

Docket No. 2005-1 CRB DTRA

NATIONAL PUBLIC RADIO, NPR MEMBER STATIONS,  
AND CPB-QUALIFIED RADIO STATIONS AMENDED  
REBUTTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

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National Public Radio ("NPR"), the Corporation for Public Broadcasting ("CPB") and CPB-qualified radio stations, collectively referred to herein as "Public Radio," makes these rebuttal findings of fact and conclusions of law in reply to those made by SoundExchange on December 12, 2006 ("SX PFFCL").

**I. SOUNDEXCHANGE'S EVIDENCE IN SUPPORT OF ITS PROPOSED FINDINGS OF FACT IS IMPROPER, MISLEADING, AND CANNOT BE RECONCILED WITH ITS ADMISSIONS**

**A. SoundExchange's Rebuttal Testimony As To Public Radio Is Improper Because SoundExchange Did Not Offer Testimony In Its Direct Case**

1. SoundExchange seeks to benefit by offering testimony against NPR in the rebuttal phase when it failed to do so as required in the direct phase of the proceeding. *See* Brynjolfsson WRT at 40-42; Griffin WRT at 12-17, 19. SoundExchange was aware prior to the filing of its Direct Statement that Public Radio and several other non-commercial licensees had filed notices of intent indicating their desire to participate in the proceeding. *See, e.g.*, Notice of Intent to Participate for NRBNMLC (3/17/2005), Notice of Intent to Participate for CBI (3/2/2005). Moreover, SoundExchange was well aware of the past precedent including the prior CARP decision, the Small Webcasters Settlement Act, and the settlement with Public Radio, that established a separate rate for non-commercial licensees. *See* Joint Noncommercial PFFCL ¶¶ 113-118. SoundExchange therefore knew (or should have known) that non-commercial licensees would seek a rate proposal consistent with this precedent.

2. Given Public Radio's participation herein, SoundExchange should have either put forth a rate proposal for non-commercial licensees or it should have proffered this testimony in the direct phase explaining why non-commercial licensees are not

entitled to a separate, lower rate. SoundExchange, however, chose neither. Instead, SoundExchange proffered testimony related only to commercial licensees in the direct phase, and then waited until the rebuttal phase to proffer testimony that should have been tendered in the direct phase. This gamesmanship has unfairly prejudiced Public Radio, because it was not afforded a full and fair opportunity to introduce affirmative evidence rebutting the testimony. Indeed, SoundExchange's ambush tactics allowed Public Radio to only cross-examine SoundExchange's proffered witnesses to demonstrate that their testimony is unfounded and incorrect.

**B. SoundExchange's Proposed Findings Of Fact Misconstrue And Seek To Misapply The Law And The Facts**

3. Not only is SoundExchange's use of its rebuttal testimony improper, but it also attempts to mislead the Judges by misconstruing and misapplying the law and the facts.

**1. SoundExchange Mischaracterizes The Applicable Statute And The Prior CARP Proceeding**

4. SoundExchange requests that the Judges conclude that nothing in the DMCA requires the them to set a separate rate for non-commercial licensees. SX PFF ¶¶ 1091. SoundExchange also argues that the Judges should find that 17 U.S.C. § 118 indicates that Congress did not intend non-commercial licensees to have its own rate. SX PFF ("If Congress had wanted to require the Judges to set such a rate, it could have said so ..."). In so doing, SoundExchange however ignores the plain language of the statute. Congress did contemplate separate rates for non-commercial licensees. The statute provides that the rates and terms set by the Judges "*shall distinguish* among the different types of eligible nonsubscription services then in operation . . . ." 17 U.S.C. § 114(f)(2)(B)

(emphasis added). Accordingly, the Judges may appropriately set different rates for non-commercial licensees than they do for commercial.<sup>1</sup>

5. As far as its characterization of the last CARP decision, SoundExchange is correct that the CARP found there was no evidence to support a differentiated rate for noncommercial licensees. However, the CARP made that finding reluctantly and on the deficiency of that record. *See* CARP Report at 93. (“Given the state of the record, the Panel *reluctantly* would have to agree . . .”) (emphasis added). This record is clearly distinguishable as it is replete with evidence demonstrative of non-commercial licensees paying differentiated rates.

## **2. SoundExchange Misrepresents And Attempts To Unfairly Characterize Testimony**

6. Throughout its Proposed Findings of Fact, SoundExchange also misrepresents and unfairly characterizes testimony.

7. By way of example only, SoundExchange misleads the Judges when it alleges that Dr. Jaffe “agreed” that whether webcasters are competing for the same audience is an “*important*” factor in deciding whether different rates would be set for different webcasters. *See* SX PFF ¶ 1101. Although Dr. Jaffe admitted that it was a *relevant* consideration, he did not unequivocally agree that it was an important one. 11/08/2006 Tr. 195:16-196:1 (stating that it “might be” an important consideration); 264:16 (Jaffe) (clarifying that it was a “relevant” consideration).

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<sup>1</sup> SoundExchange does admit in its conclusions of law that the Judges have discretion to set a different rate for Public Radio. *See* SX Proposed Conclusions of Law ¶ 67

8. Moreover, after misrepresenting Dr. Jaffe's testimony as an unqualified assertion when it was not, SoundExchange then seeks a finding that Dr. Jaffe did not propose different rates for different webcasters and business models should be held against NPR. *See* SX PFF ¶ 1102. However, Dr. Jaffe, a witness for Public Radio and DiMA, has no obligation – unlike SoundExchange – to propose rates for small webcasters or even for simulcasters. Indeed, there was no reason that he should have proposed a rate for participants for whom he did not serve as an expert, as he was only asked to do so by a group of DiMA member companies in the direct phase of the case. *See* Jaffe WDT at 2-3.

9. Moreover, having requested a finding of fact that Dr. Jaffe did not propose rates for certain webcasters, SoundExchange's submission is incomplete because it fails to further mention or request a finding of fact that Dr. Jaffe did embrace a different rate for Public Radio than the rate he has proposed for for-profit large webcasters. *See* Jaffe-NPR WRT at 6 ("Conclusions about the appropriate competitive market royalty for sound recordings for public radio cannot be based on models derived from the assumed behavior of for-profits firms. Rather, they should be based, if possible, on evidence specific to public radio.").

**C. SoundExchange's Rebuttal Testimony Is Unreliable Because It Cannot Be Reconciled With Its Adverse Admissions**

10. In SoundExchange's direct case, both of its economists disavowed the applicability of their benchmarks to non-commercial licensees. Accordingly, to extricate itself from the pigeon hole it created by proposing a single rate for all licensees, SoundExchange introduced theories of Public Radio's cannibalization and convergence

for the first time on rebuttal. Given that SoundExchange continues to disavow the applicability of their benchmarks to non-commercial licensees, the Judges should find that they cannot mandate one rate for commercial and non-commercial licensees.

11. Importantly, SoundExchange's own economists recognize that non-commercial licensees are not primarily driven by market concerns. Public Radio therefore cannot be subjected to the same rates premised on profit-maximizing webcasters.<sup>2</sup>

12. Indeed, in paragraph 211 of its proposed findings of fact and conclusions of law, SoundExchange proposes that the Judges find:

It does not make sense to set a market rate based on smaller webcasters, non-commercial webcasters or other webcasters not attempting to maximize their webcasting revenues, *because those buyers are not primarily driven by market concerns.*

SX PFF ¶ 211 (citing Brynjolfsson WRT at 36); *see also* Pelcovits WDT at 5.

(stating that his analysis too is concerned only with commercial profit maximizing entities). SoundExchange should not be permitted to have it both ways.

## **II. SOUNDEXCHANGE'S ALLEGATIONS OF CANNIBALIZATION ARE INCORRECT AND UNFOUNDED.**

13. SoundExchange's notion of cannibalization is nothing more than an economic theory, inappropriately introduced for the first time on rebuttal, and in direct conflict with its other admissions. *See supra* I, C. SoundExchange has not offered any

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<sup>2</sup> SoundExchange seeks to justify these extortionist rates under both theories of cannibalization and convergence. SX PFF ¶¶ 1087-88. The evidence however supports neither theory. *See infra* §§ II, III.

analysis to support its theory. Moreover, non-commercial licensees have had the benefit of lower rates for a number of years, and SoundExchange has not even sought (1) to show that cannibalization occurred or (2) to provide an explanation why cannibalization has not occurred. *See also* Joint Non-Commercial PFFCL, Sec. XI.

### **III. SOUNDEXCHANGE'S CONVERGENCE THEORY FAILS BECAUSE PUBLIC RADIO IS EASILY DISTINGUISHABLE FROM COMMERCIAL RADIO**

14. SoundExchange posits that the Judges should apply the same rate to both commercial and non-commercial licensees because Public Radio is not distinguishable from other participants in this proceeding. SoundExchange, however, is incorrect. The evidence demonstrates that Public Radio does not compete with commercial broadcasters or webcasters. Nor do they share the same audience. Moreover, the evidence demonstrates that public radio uses music not to entertain, but to educate. This section provides those and other reasons why Public Radio is easily distinguishable from commercial.

#### **A. Public Radio Does Not Compete With Commercial Broadcasters Or Webcasters**

15. For the proposition that non-commercial services compete with commercial services, SoundExchange points to the testimony of Robert Roback from Yahoo! SX PFF ¶ 1116. However, this testimony does not support the finding SoundExchange proposes. Mr. Roback was asked whether it was his testimony that terrestrial radio was a major competitor and he unequivocally stated, "Yes." *See* 6/21/06 Tr. 389:1-5. On the other hand, when asked whether Yahoo! competed with non-commercial licensees, Mr. Roback was far from unequivocal. He ultimately premised an



affirmative response on the notion that Yahoo! was competing for a consumer's time. *Id.* 390:1-6.

16. Any dispute over Roback's testimony on webcasters believing themselves to be in competition with non-commercial licensees can be resolved easily by considering the response from Christine Winston of AOL, which like Yahoo! is a DiMA member company. Ms. Winston states that AOL does not view public radio to be a competitor of the AOL radio service. *See* 11/6/2006 Tr. 397-99 (Winston).

17. Accordingly, the mere fact that Public Radio, like any other form of media or entertainment, such as CDs, DVDs and video games, may "compete" for a consumer's time, does not lead to the conclusion that Public Radio is a competitor of commercial webcasters, particularly when there is ample evidence in the record to conclude that Public Radio is not a competitor of commercial webcasters.

**B. Public Radio Serves A Different And Unserved Audience**

18. The Public Radio audience is different; it constitutes the audience not served by the commercial marketplace. Indeed, Public Radio was created to provide content that commercial media simply do not provide. *See* 6/27/06 Tr: 71:5-9 (Stern). *See also* Public Radio's PFF ¶¶ 15-17.

19. In an effort to prove that the same audience is served by commercial and public radio stations, SoundExchange's witness, Mr. Griffin, offers the example of Y100 in Philadelphia. *See* SX PFF ¶ 1117. However, this example makes the very point that Public Radio offers programming that is not offered in the marketplace. Y100 was a commercial radio station that went off-the-air and was resuscitated by the local NPR

station. *Id.* Apparently, while Y100 was not commercially viable, the NPR station believed its programming has intrinsic value even if it does not attract a large audience, which is completely consistent with NPR's mission - to offer quality programming regardless whether it attracts the largest audience. *See* Public Radio's PFF ¶ 16.

**C. Public Radio Programming Does Not Use Music Like A Commercial Service Does**

20. Despite SoundExchange's allegations to the contrary, Public Radio is not providing entertainment like a commercial service would. Indeed, the evidence demonstrates that Public Radio uses music to educate, which is "distinguishable from what commercial media does. It's really to provide the full basket of information that allows people to learn about music, evaluate music, and really decide whether it's the type of music they want to listen to in the future." *See* 6/27/06 Tr. 85:4-85:11 (Stern).

**D. Reliable Evidence Distinguishes NPR From Commercial Stations**

21. SoundExchange relies on a few "atypical" stations to make sweeping claims about non-commercial stations' uses of music and the audience for them. *See* SX PFF ¶ 1122. This evidence was introduced primarily through Dr. Brynjolfsson, who says he suspects that the audience for KPLU is larger than most NPR station audiences. *See* Tr. 268:5-10 (Brynjolfsson). He then admits that he has no idea what the average audience size is for NPR member stations. *See id.* 268:11-12. Dr. Brynjolfsson also has no understanding of NPR's future plans for music. *See* 11/21/06 Tr. 269:13-14 ("No, I don't know if they are still planning on doing that."). Indeed, he knows nothing more than what is found in a press release, and he could not even verify whether the press release is accurate. *See id.* 269:2-4.

22. Contrary to the claims made by SoundExchange, there is more reliable evidence on the record that demonstrates the character of NPR's news/information webcasting (i.e., simulcasting) to be different than commercial music webcasting. Indeed, Mr. Stern notes that there has been a gradual shift in NPR member stations from music programming to news and information programming. *See* 6/27/06 Tr. 103:12-14 (Stern). In fact, only "6 percent of listener hours for NPR programming is music programming." *Id.* 99:9-11. Therefore, the content of NPR programming is far different from commercial webcasters' programming.

**E. NPR Does Not Have The Same Ability To Pay As Commercial Webcasters**

23. SoundExchange claims that NPR is able to pay a market-based royalty on a variety of sources of funding and revenues. SoundExchange, however, is wrong.

24. First, SoundExchange argues that NPR can pay market-based royalties because it is monetizing webcasting. SX PFF ¶¶ 1129-30. In so doing, SoundExchange relies on Mr. Griffin, who does not have any knowledge regarding NPR's alleged monetization of webcasting. He has not conducted any study of NPR stations and what they may, if anything, be earning from webcasting. *See* 11/22/06 Tr. 251:2-20 (Griffin). And he has not seen any financial statements from an NPR station showing revenue earned from webcasting. Finally, Mr. Griffin knows of no underwriter interested in NPR's website. *See* 11/22/06 Tr. 251:21-252:8 (Griffin). SoundExchange's argument is unsupported by the evidence.

25. Second, SoundExchange also describes that NPR receives funding from the NPR Foundation. *See* SX PFF ¶ 1132. SoundExchange, however, ignores the reality

that use of most of this money is restricted. *See* SX Exhibit 213RP at 2-3, 5 (noting that restricted are not available freely to spend as they must be maintained); *see also* 11/21/06 Tr. 269:15-270:13 (Brynjolfsson). Therefore, this source of funding does not amount to an ability to pay market rates.

26. Third, SoundExchange suggests that NPR and its member stations have plenty of funding to pay market rates for webcasting given the amount of NPR's budgets and the revenue for some member stations in the largest markets. *See* SX PFF ¶¶ 1131-33. SoundExchange, however, completely ignores the costs that NPR and its member stations incur to operate and fulfill their public mission. *See* SX PFF ¶ 1133.

27. Fourth, SoundExchange cites the amount of grants and donations NPR has received. SX PFF ¶¶ 1144-45. What SoundExchange does not allege – because it cannot – is that these donations are a result of music programming.

28. In sum, while SoundExchange describes the amount and sources of funds NPR depends upon, SoundExchange ignores the fact that these funds are raised to cover the costs that NPR incurs to develop and distribute quality programming. *See* SX PFF ¶¶ 1129-148. Moreover, SoundExchange fails to address that NPR and these stations are not-for-profit. Public Radio PFF ¶ 15 Therefore, despite sources of funding, budgets and revenues, NPR's and stations' costs offset funding such that they do not turn a profit. None of this means NPR and its member stations have the ability to pay market rates.<sup>3</sup>

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<sup>3</sup> SoundExchange furthermore is not able to draw any nexus between these funding sources and NPR's limited music programming. Overwhelmingly, the listening public tunes into NPR for its news and information programming (not for music programming). *See* Stern WDT at 6-7, *see also* 6/27/06 Tr. 274:21-275:16; 289:18-290:4 (Stern)

**F. Underwriting And Sponsorship Are Not Equivalent To Advertising Revenue**

29. SoundExchange also wrongly attempts to equate underwriting to advertising in the commercial context. FCC regulations, however, prohibit noncommercial stations from engaging in advertising. *See* 11/22/06 262:8-20 (Griffin), *see also* 6/27/06 76:14-18 (Stern); 8/2/06 169:21-170:8 (Robedee); 5/17/06 295:4-12 (Fink) Moreover, Mr. Griffin admits that the noncommercial stations cannot make the same underwriting announcement that a commercial broadcaster can make for an advertiser. *See* Joint Non-Commercial Broadcasters PFFCL, Sec. II,B,4.

30. The regulations prohibiting non-commercial stations from advertising fundamentally handicap Public Radio's ability to respond to any increase in the sound recording royalty. *See* Public Radio's PFF ¶ 10 (explaining that Public Radio lacks any mechanism, such as market forces, to increase underwriting in response to higher royalty rates).

31. Additionally, the fact that NPR may employ development personnel to raise funds from underwriting or corporate sponsorship is meaningless. *See* SX PFF ¶¶ 1142-43. It evidences only that NPR is making efforts to raise the funds it needs to operate.<sup>4</sup>

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<sup>4</sup> While SoundExchange still relies on Mr. Griffin to state an undisputed fact, (i.e., that NPR must employ the personnel to raise the money operate), SoundExchange no longer attempts to allege that there is "a team devoted to gleaning fully the revenues from webcasting." Griffin WRT at 12.

**G. SoundExchange Ignores The Unpredictable Nature Of Funding For Public Radio**

32. SoundExchange's presentation of Public Radio's financial picture is only half the picture (the revenue side); and it is further limited in that it is merely a snap-shot of the present time. It does not present the historical picture. For example, Dr. Brynjolfsson who discusses WAMU, a member station serving the Washington, DC market, admits he does not know the station recent past of experiencing several years of financial trouble. *See* 11/21/06 Tr. 273:12-16 (Brynjolfsson)

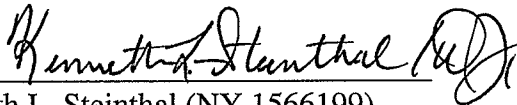
33. SoundExchange offers no evidence about the financial future of Public Radio nor for that matter any information rebutting the testimony describing the unpredictable nature of funding for Public Radio. Stern explains that the funding for Public Radio is not tied to the value of its programming but several other factors that Public Radio has no control over. *See* Stern WDT at 11. *See also* Jaffe-NPR WRT at 3. For example, the strength of the national economy or local economy affects corporate underwriting and personal contributions from listeners.

34. Political considerations also affect funding for Public Radio. *See* Stern WDT at 11. First, there is no consensus that Public Radio should receive government funding. *See* Stern WRT at 12 (explaining that some legislators have called for a defunding of public broadcasting). Second, to the extent Public Radio receives any government money, there is no reason to expect that Public Radio will get any increases in the money. *See id.* Stern explained that such costs as the war in Iraq and the clean-up from hurricane Katrina, along with the expanded federal deficit, make it inevitable funds for Public Radio will be cut to help offset these costs. *Id.*

35. Because SoundExchange has gamed this proceeding, offered testimonial evidence from purported experts who in fact know nothing about Public Radio or for that matter non-commercial licensees, and has expediently cited the record in this proceeding for unsustainable propositions of fact and law, its Proposed Findings of Facts and Conclusions of Law as it relates to Public Radio should be rejected.

Dated: December 18, 2006

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